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THE AMERICAN-BRITISH ATLANTIC FISHERIES QUESTION.

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When the thirteen original colonies and the mother land closed in 1783 by the Treaty of Paris the civil war that had raged between them since 1775, and the United States were recognized by Great Britain as a member of the family of nations, both parties thought that, by that treaty of partition of 1783, they had arranged all the differences then existing between them. But during the century and a quarter that has elapsed since the Treaty of Paris was signed, the United States and Great Britain have been engaged in endless discussions and arguments concerning the proper interpretation of that treaty. Among these mooted questions, that of the Atlantic fisheries has been a fruitful bone of contention between the two leading Anglo-Saxon powers. At length, just as so many other points of difference between these two nations have been settled in peace by a reference to international arbitration, so this question of the Atlantic fisheries is to be so arranged by referring it to the decision of The Hague International Court. This sensible and humane agreement of two great powers to refer the solution of this question to that august tribunal instead of allowing it to become a cause of war, will be another " mile stone " in the evolution of inter-

national arbitration. In the following paper, I have briefly considered this important and live question.

Great Britain and her North American colonies shared in the burdens and anxieties of the struggle that resulted in the overthrow of the French power in North America, and after the cession of Canada and the French maritime provinces around the Gulf of Saint Lawrence to the British Empire in 1763, the motherland of England and the British North American colonies had in common a large heritage in northeastern America. And the fishermen of the northeastern colonies resorted to the Gulf of Saint Lawrence and adjacent waters to catch their share of the rich harvest of fish that was to be found in those waters.[1]

During the negotiations for peace at Paris in 1782 between the motherland and her revolted colonies, one of the subjects that gave much cause of trouble to the negotiators was the right to participate in the fisheries. On November 25, 1782, the British commissioners proposed to the American negotiators that the citizens of the United States should have the liberty of taking fish of every kind in all the waters of the Gulf of Saint Lawrence and on all the Newfoundland banks, and to dry and cure fish on the shores of the Isle of Sables and of the Magdalen Islands in the Gulf of Saint Lawrence, so long as those coasts remained unsettled, on "condition that the citizens of the United States do not exercise the fishery but at the distance of three leagues from all the coasts belonging to Great Britain, as well those of the continent as those of the islands situated in the Gulf of Saint Lawrence. And as to what relates to the fishery on the coast of the island of Cape Breton out of the said gulf, the citizens of the said United States shall not be permitted to exercise the said fishery but at the distance of fifteen leagues from the coasts of the island of Cape Breton."[2]

By this proposition not only were American citizens prevented

[1] Sir George Otto Trevelyan, "The American Revolution," New York, 1899, Part I., pp. 263, 264.

[2] Francis Wharton, "The Revolutionary Diplomatic Correspondence of the United States," Washington, 1889, Vol. VI., pp. 74–76.

from drying fish on the shores of Nova Scotia, but also to catch fish within three leagues of the shores around the Gulf of Saint Lawrence and within fifteen leagues of the shores of Cape Breton Island on its seaward side. Thus by this last provision the British envoys wished to close to American citizens the right to fish in a part of the high seas that were then recognized as a joint possession of all mankind. These proposals were promptly rejected by the American commissioners, and on November 28, John Adams, for the latter, submitted a counter plan.[3] Further parleys were held on this important question. As the Americans contended firmly for the rights of their citizens to fish on the Newfoundland banks, and Adams said he would not sign any agreement that did not secure to the American fishermen the right to catch fish in the Newfoundland and adjacent waters, the British commissioners yielded the point.[4] After numerous propositions and changes, the contending negotiators at length agreed on the following article that was embodied in the treaty of peace finally signed in 1783.[5]

Article III. It is agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland; also in the Gulph of St. Lawrence, and at all other places in the sea, where the inhabitants of both countries used at any time heretofore to fish. And also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fisherman shall use, (but not to dry or cure the same on that island;) and also on the coasts, bays and creeks of all other of his Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbors and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlements, without a previous agreement for that purpose with the inhabitants, proprietors or possessors of the ground.

Thus that treaty, that provided for a partition between the motherland and her North American colonies of the territory that they enjoyed in common, also provided for a partition in the en-

[3] Francis Wharton, "The Revolutionary Diplomatic Correspondence of the United States," Washington, 1889, Vol. VI., p. 85.

[4] Francis Wharton, "The Revolutionary Diplomatic Correspondence of the United States," Washington, 1889, pp. 86–87.

[5] "Treaties and Conventions concluded between the United States of America and other Powers since July 4, 1776," Washington, 1889, p. 377.

joyment of the "right" to reap the benefits of the rich fisheries around Newfoundland and in the adjoining waters that the subjects of the motherland and the colonies had won by their joint exertions and valor. And subject to the provisions of the treaty of peace as embodied in its third article, American fishermen continued to take fish in the waters around Newfoundland and the Gulf of Saint Lawrence as formerly they had fished in those same waters as British subjects.

When the American and the British negotiators met at Ghent in August, 1814, to agree upon a treaty of peace to put an end to the state of war existing between their respective countries, the British commissioners said, among other things, that

> They felt it incumbent upon them to declare that the British Government did not deny the right of the Americans to fish generally, or in the open seas; but that the privileges formerly granted by treaty to the United States of fishing within the limits of the British jurisdiction, and of landing and drying fish on the shores of the British territories, would not be renewed without an equivalent.[6]

A few days later the British commissioners also brought up the question of the free navigation for British subjects of the Mississippi River.[7] In the following November the American negotiators in submitting a project for a treaty to their British colleagues, said, in an accompanying note that they were "not authorized to bring into discussion any of the rights or liberties" that the United States had up to then enjoyed in the fisheries. After much sparring between the two groups of negotiators as to the fisheries, the navigation of the Mississippi and other points of difference, the two sides, who were both desirous of concluding peace, agreed to exclude altogether any mention of either the fisheries or the navigation of the Mississippi from the treaty of peace that they concluded at Ghent on December 24, 1814.[8]

The rights of American fishermen in the northeastern American

[6] "American State Papers: Class I., Foreign Relations," Washington, 1832, Vol. III., p. 705.

[7] John Quincy Adams, "The Duplicate Letters, The Fisheries and the Mississippi; Documents relating to transactions of the Negotiations of Ghent," Washington, 1822, pp. 54, 55, 184.

[8] "American State Papers: Class I., Foreign Relations," Washington, 1832, Vol. III., pp. 744, 745.

fisheries came to public notice a few months later. On June 19, 1815, the British sloop *Jaseur,* warned an American cod fishing vessel, when out in the open sea some forty-five miles from Cape Sable, not to approach within sixty miles of the coast. This act trenching on the rights of all mankind to fish in the open sea, the British government disowned.[9] Lord Bathurst, however, at the same time said to John Quincy Adams that while the British government "could not permit the vessels of the United States to fish within the creeks and close upon the shores of the British territories," it would not interfere with American fishermen "in fishing anywhere in the open sea, or without the territorial jurisdiction, a marine league from shore."[10]

The question of whether or not the third article of the American-British treaty of peace of 1783—whereby American fishermen were secured fishing rights in certain of the territorial waters of Britain in North America—was abrogated by the War of 1812, was during the next few months discussed by John Quincy Adams, American Minister to Great Britain, and Lord Bathurst, British Minister of Foreign Affairs. On September 25, 1815, Mr. Adams, in a communication addressed to the Earl of Bathurst, argued that the treaty of 1783 was "not, in its general provisions, one of those which, by the common understanding and usage of civilized nations, is or can be considered annulled by a subsequent war between the same parties."[11]

On October 30 following, Lord Bathurst replied to Mr. Adams at length. He said:[12]

> To a position of this novel nature Great Britain can not accede. She knows of no exception to the rule, that all treaties are put an end to by a subsequent war between the same parties. . . . The treaty of 1783, like many other, contained provisions of different characters—some in their own nature irrevocable, and others of a temporary nature. . . . The nature of the liberty

[9] "American State Papers: Class I., Foreign Relations," Washington, 1834, Vol. IV., p. 349.

[10] "American State Papers: Class I., Foreign Relations," Washington, 1834, p. 350.

[11] "American State Papers: Class I., Foreign Relations," Washington, 1834, p. 352.

[12] "American State Papers: Class I., Foreign Relations," Washington, 1834, pp. 354, 355.

to fish within British limits, or to use British territory, is essentially different from the right of independence, in all that may reasonably be supposed to regard its intended duration. . . . In the third article (of the treaty of 1783), Great Britain acknowledges the *right* of the United States to take fish on the banks of Newfoundland and other places, from which Great Britain has no right to exclude an independent nation. But they are to have the *liberty* to cure and dry them in certain unsettled places within His Majesty's territory. If these liberties, thus granted, were to be as perpetual and independent as the rights previously recognized, it is difficult to conceive that the plenipotentiaries of the United States would have admitted a variation of language so adapted to produce a different impression; and, above all, that they should have admitted so strange a restriction of a perpetual and indefeasible right as that with which the article concludes, which leaves a right so practical and so beneficial as this is admitted to be, dependent on the will of British subjects, in their character of inhabitants, proprietors, or possessors of the soil, to prohibit its exercise altogether. It is surely obvious that the word *right* is, throughout the treaty, used as applicable to what the United States were to enjoy, in virtue of a recognized independence; and the word *liberty* to what they were to enjoy, as concessions strictly dependent on the treaty itself.

On January 22, 1816, the American Minister addressed a reply to Lord Castlereagh, who had in the meantime succeeded Lord Bathurst as foreign secretary. He said the treaty of 1783 was intended to arrange the whole scope of the diplomatic relations between the two nations. He said the British note admitted that treaties often contained recognitions in the nature of continuing obligations; and that it admitted that the treaty of 1783 was such a treaty, except a small part of the article relating to the fisheries and the article about the navigation of the Mississippi.

In searching for the answer of International Law to this difference of opinion, two principal sources can be looked to—the judgments of courts of law and the opinions of leading international jurists. In the first class there are two judgments, one rendered by an American and the other by an English court, that sustain the American contention that the third article of the treaty of 1783 was not terminated by the War of 1812.

In the case of the "Society for the Propagation of the Gospel in Foreign Parts *vs.* The Town of Newhaven," the Supreme Court of the United States, in rendering judgment, was called upon to pass on the continuance or extinguishment of treaties, especially upon that of 1783, by a subsequent war. On March 12, 1823, Mr. Justice Wash-

ington,[13] delivered the opinion of the court. On the continuance of treaties, he held:[14]

But we are not inclined to admit the doctrine urged at bar, that treaties become extinguished, *ipso facto,* by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the Law of Nations, dealing in general terms on this subject, we are satisfied, that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning.

We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.

In the case of "Sutton *vs.* Sutton," in order to decide the case at bar, it was necessary for the British High Court of Chancery to pass upon the continuance or abrogation of the treaty of 1794, between America and Britain, known as Jay's Treaty, after the War of 1812 between these two powers. Sir John Leach, Master of the Rolls in the British High Court of Chancery held:[15]

The relations, which subsisted between Great Britain and America, when they formed one empire, led to the introduction of the ninth section of the treaty of 1794, and made it highly reasonable that the subjects of the two parts of the divided empire should, notwithstanding the separation, be protected in the mutual enjoyment of their landed property; and, the privileges of natives being reciprocally given, not only to the actual possessors of lands but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should be permanent, and not depend upon the continuance of a state of peace.

[13] Mr. Justice Bushrod Washington.

[14] Wharton's "United States Supreme Court Reports," New York, 1823, p. 494.

[15] Russell and Mylne's "Chancery Court Reports," Vol. I., 676.

International publicists are not unanimous on the question whether war terminates all or every part of treaties. Formerly the weight of opinion held to the view that a state of war between two nations terminated the treaties between them *in toto*. To-day, however, the weight of opinion, in accordance with the trend of International Law towards the more humane goal of mitigating and lessening war, tends to the view that many treaties, either in their entirety or in part, are not abrogated by a state of war by the contracting states.

In support of the former or English view, there is Vattel, who says:[16]

> Les conventions, les traités faits avec une Nation, sont rompus ou annullés par la guerre qui séléve entre les contractans; soit parce qu'ils supposent tacitement l'état de paix, soit parce que chacun pouvant dépouiller son ennemi de ce qui lui appartient, lui ôte les droits qu'il lui avoit donnés par des traités.

Phillimore, the English jurist, maintains almost the same view.[17]

Oppenheim, formerly of the University of London, now of Cambridge University, leans rather to the modern and more liberal view. He says:[18]

> The doctrine was formerly held, and a few writers maintain it even now, that the outbreak of war *ipso facto* cancels all treaties previously concluded between the belligerents, such treaties only excepted as have been concluded especially for the case of war. The vast majority of modern writers on International Law have abandoned this standpoint, and the opinion is pretty general that war by no means annuls every treaty. But unanimity in regard to such treaties as are and such as are not cancelled by war does not exist. Neither does a uniform practice of the states exist, cases having occurred in which states have expressly declared that they considered all treaties annulled through war. Thus the whole question remains as yet unsettled. But nevertheless with the majority of writers a conviction may be stated to exist on the following points:
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> . . . .
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> 3. Such political and other treaties as have been concluded for the purpose of setting up a permanent condition of things are not *ipso facto* annulled by the outbreak of war, but in the treaty of peace nothing prevents the victorious party from imposing upon the other party any alterations in, or even the dissolution of, such treaties.

[16] Emer de Vattel, "Le Droit des Gens ou Principes de la Loi Naturelle." A Amsterdam chez E. van Harrevelt, 1775, Vol. II., p. 81.

[17] Robert Phillimore, "Commentaries upon International Law," Philadelphia, 1857, Vol. III., p. 457, et seq.

[18] L. Oppenheim, "International Law," London, 1906, Vol. II., p. 107.

Henry Wheaton, an American, says that all treaties are not terminated by war.[19]

Englishmen, too, holding Government positions, have thought that not all treaties were abrogated by war. Thus in February, 1765, Sir James Marriott, the advocate-general, held that the treaty of neutrality of 1686 between Great Britain and France was "a subsisting treaty, not only because it is revived, by a strong implication of words and facts but for that it may be understood to subsist because it never was abrogated."[20] And speaking in the House of Commons in 1783, Charles James Fox gave it as his opinion that all treaties were not ended by a subsequent war between the contracting nations.[21]

From 1815 to 1818 Great Britain continued to maintain, in spite of the third article of the Treaty of 1783, that American fishermen had no right to fish in British territorial waters; and during those years British government vessels seized numerous American vessels found fishing in British waters. These seizures and the consequent partial stoppage of the fishing rights of the American fishermen created much bad feeling.

In order to avoid this continual cause of friction between the American republic and the British empire, which kept alive and inflamed the bad feelings between the peoples of the two nations, the two governments agreed on October 20, 1818, on a convention to settle the fishery controversy on the principle of mutual concessions. This convention was negotiated for the United States by Albert Gallatin and Richard Rush, and for great Britain by Frederick J. Robinson and Henry Soylburn. The fishing rights of Americans in the British territorial waters were defined in Article one that read as follows:[22]

Article I. Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof, to take, dry, and cure fish

[19] Henry Wheaton, "Elements of International Law," eighth edition, edited by Richard Henry Dana, Jr., Boston, 1866, p. 340.

[20] George Chalmers, "Opinions of Eminent Lawyers, on Various Points of English Jurisprudence, Chiefly Concerning the Colonies, Fisheries and Commerce of Great Britain," London, 1814, Vol. II., p. 355.

[21] Hansard, "Parliamentary Debates," Vol. XVIII., London, 1814, p. 1147.

[22] "Treaties and Conventions concluded between the United States of America and other Powers since July 4, 1776," Washington, 1889, p. 415.

on certain coasts, bays, harbours, and creeks of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties, that the inhabitants of the said United States shall have forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbours, and creeks from Mount Joly on the southern coast of Labrador, to and through the Streights of Belleisle and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson Bay Company: And that the American fishermen shall also have liberty forever, to dry and cure fish in any of the unsettled bays, harbours, and creeks of the southern part of the coast of Newfoundland hereabove described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish on, or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America not included within the above-mentioned limits; Provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

By this new agreement both sides gave up something, and, as they thought at the time, they also in that way expected to peacefully adjust the whole northeastern fishery question for the future. The march of time and events have shown how far wrong the two governments were in the latter hope. And to-day what is meant by the language of the first article of that treaty is in dispute between the two powers, and the fishery question remains for all practical purposes as unsettled to-day as it was before the negotiation of the convention of 1818.

A comparison of the provisions of the Treaty of 1783 and that of 1818 in reference to the fisheries, shows that the right of Americans to catch fish in the Gulf of Saint Lawrence, on the Newfoundland Banks, and at all other places in the sea, remain the same. In other words, that both diplomatic agreements confirm the rights of Americans to take fish on the high seas, that is in all

waters that are not known as territorial. But the liberty granted to American fishermen to fish within British territorial waters by the Treaty of 1783 is much curtailed by the convention of 1818. The former instrument gave to Americans the liberty to fish along the British coasts generally and "to dry and cure fish in any of the unsettled bays, harbors and creeks of Nova Scotia, Magdalen Islands and Labrador, so long as the same shall remain unsettled." The convention of 1818 curtailed the liberty of Americans to fish in British territorial waters to the shores of Newfoundland, along its southern coast from Cape Ray to the Rameau Islands and on its western and northern sides from Cape Ray to the Quirpon Islands; to the shores of the Magdalen Islands in the Gulf of Saint Lawrence; and to the coast of Labrador from Mount Joly indefinitely to the east and the north.

On June 14, 1819, the British Parliament passed an act to carry the first article of the convention of 1818, which specified the rights of Americans to take fish in the waters around Newfoundland, into effect.

Everything on the fishing grounds did not run smoothly. A number of American fishing vessels were seized by the British authorities. Correspondence upon the subject between the constituted authorities of the two powers resulted from 1822 to 1826.[23] Then for a decade, comparative quiet seems to have reigned concerning the fishery rights. In 1836, however, the legislature of Nova Scotia began to attempt to prevent American fishing vessels from catching fish in the waters adjoining the shores of Nova Scotia. First it passed a "hovering act," to prevent American fishing vessels from sailing within three miles of the coast; then Nova Scotia sought to exclude American fishermen from all bays, including even the Bay of Fundy, which is over sixty miles wide and nearly a hundred and forty miles long, that are bound by the shores of Nova Scotia.[24] That province also attempted to deny to American vessels the right

[23] Senate Executive Documents, No. 100, 32d Congress, 1st Session, Washington, 1852, pp. 1–55.

[24] Senate Executive Documents, No. 100, 32d Congress, 1st Session, Washington, 1852, p. 108.

of free passage through the Gut of Canso between Nova Scotia and Cape Breton.[25]

The British authorities based their rights to exclude American vessels from fishing in the Nova Scotia bays, no matter what their area, upon the renunciation by the United States in the first article of the convention of 1818 "to take, dry, or cure fish on, or within three marine miles of any of the coasts, bays creeks, or harbors of his Britannic Majesty's Dominions in America" outside of those of the shores of the Magdalen Islands, the coasts of Canada and Labrador east and north of Mount Joly, and a part of the shores of Newfoundland. To this preposterous claim of the British authorities, that ran counter to the accepted Law of Nations that had gradually opened the high seas to the vessels of all nations *except* within three miles of the shore and within those bays and fiords that were less than six miles wide, the American government protested. American fishing vessels were seized within the Bay of Fundy by the British authorities. Conscious that this attempt to apply territorial rights to such a large body of water, which obviously constituted a part of the high seas, was in contravention of the Law of Nations, the British government in 1845 gave up its claim as to the Bay of Fundy, stating, however, that it made this concession as to that one bay only.[26] Daniel Webster, Secretary of State for America, and Lord Malmesbury for Britain, stated in 1852 the views of the two countries. In the summer of the same year, Senator Cass, in the United States Senate, spoke on this question. He illuminated the subject by referring to the last part of article one of the convention of 1818 which provided that "American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water," and argued that this language meant the small bays into which vessels were accustomed to seek shelter from storms. Senator Cass said:

[25] Lorenzo Sabine, "Report on the Principal Fisheries of the American Seas," House of Representatives, Miscellaneous Documents, No. 31, 42d Congress, 2d Session, p. 221.

[26] Documents of the United States Senate, Special Session called March 4, 1853, Washington, 1853, Senate Document 3, pp. 4–8, 9–21.

That such was the understanding of our negotiators is rendered clear by the terms they employ in their report upon this subject. They say: "It is in that point of view that the privilege of entering the ports for shelter is useful," etc. Here the word "ports" is used as a descriptive word, embracing both the bays and harbors within which shelter may be legally sought, and shows the kind of bays contemplated by our framers of the treaty. And it is not a little curious that the Legislature of Nova Scotia have applied the same meaning to a similar term. An Act of that Province was passed March 12, 1836, with this title: "An act relating to the fisheries in the Province of Nova Scotia and the coasts and harbors thereof," which act recognizes the convention, and provides for its execution under the authority of an imperial statute. It declares that harbors shall include bays, ports, and creeks. Nothing can show more clearly their opinion of the nature of the shelter secured to the American fishermen.[27]

In 1853 America and Great Britain agreed to a convention, whereby a settlement of all claims by citizens or corporations of either country against the other should be referred to a mixed commission, composed of two commissioners, one for each nation.[28] In every case where the commissioners could not agree the convention provided that they should refer it to an umpire. In that way the claims arising out of the seizures by the Canadian authorities in 1843 of the American fishing vessel, *Washington*,[29] while fishing in the Bay of Fundy, ten miles from shore, and in 1844 of the American schooner, *Argus*,[30] on St. Ann's Bank, twenty-eight miles from the nearest land, were referred for settlement to the umpire, Mr. Bates, an American by birth, residing in England where he was a member of the banking house of Baring. In both cases he awarded damages to the American owners, on the ground that in neither case were the American vessels fishing in contravention of the convention of 1818.

With the object of amicably adjusting the various controversial points that had arisen under the interpretation of the convention of 1818, the British government in 1854 sent Lord Elgin to America to

[27] "Congressional Globe," 32d Congress, 1st Session, Appendix, Washington, 1852, p. 895.

[28] "Treaties and Conventions concluded between the United States of America and other Powers since July 4, 1776," Washington, 1889, p. 415.

[29] Senate Executive Document, No. 103, 34th Congress, 1st Session, Washington, 1856, p. 184.

[30] Senate Executive Document, No. 113, 50th Congress, 1st Session, Washington, 1888, p. 59.

negotiate with the American government to that end. And on June 5, 1854, the Hon. William L. Marcy, the American Secretary of State, and Lord Elgin, special British envoy, concluded a treaty relating to the fisheries, commerce and navigation. By its provisions liberty was extended to American fishermen to catch fish of all kinds, "except shellfish," in British or Canadian territorial waters over and above the British territorial waters in which they had the *right* to fish by the convention of 1818.[31] The treaty extended a similar liberty to British subjects of fishing in the American Atlantic territorial waters above the thirty-sixth parallel of north latitude. It provided also for reciprocal free trade between America and the British North American colonies in various articles; and prescribed certain regulations for the navigation of the Saint Lawrence River, Lake Michigan and such Canadian Canals as were necessary to an all water way communication between the Atlantic Ocean and the Great Lakes. The treaty went into effect on March 16, 1855, and, according to the notice of the United States terminated March 17, 1866. During this period friction over the fishery rights of American fishermen reserved in British waters by the convention of 1818 were happily avoided. And upon the termination in 1866 of the reciprocity treaty of 1854, the Canadian government, for three years, granted licenses to American fishing vessels, at so much a ton, to exercise the same liberties they had obtained under the treaty of 1854.

For the fishing season of 1870 the practice of granting licenses to the American vessels was stopped, and the British government notified the government of America that her Britannic Majesty's government was of the opinion that by the convention of 1818 the American government had "renounced the right of fishing, not only within three miles of the colonial shores, but within three miles of a line drawn across the mouth of any British bay or creek." This communication continued:

> It is, therefore, at present the wish of Her Majesty's government neither to concede nor for the present to enforce any rights which are in their nature open to any serious question. Even before the conclusion of the reciprocity

[31] "Treaties and Conventions concluded between the United States of America and other Powers since July 4, 1776," Washington, 1889, p. 449.

treaty Her Majesty's government had consented to forego the exercise of its strict right to exclude American fishermen from the Bay of Fundy, and they are of opinion that during the present session that right should not be exercised in the body of the Bay of Fundy, and that American fishermen should not be interfered with, either by notice or otherwise, unless they are found within three miles of the shore, or within three miles of a line drawn across the mouth of a bay or creek which is less than ten geographical miles in width, in conformity with the arrangement made with France in 1839.[32] . . . Her Majesty's government do not desire that the prohibition to enter British bays should be generally insisted on, except when there is reason to apprehend some substantial invasion of British rights. And in particular they do not desire American vessels to be prevented from navigating the Gut of Canso (from which Her Majesty's government are advised they may lawfully be excluded), unless it shall appear that this permission is used to the injury of colonial fishermen, or for other improper objects.[33]

On November 25, 1870, an American vessel, the *White Fawn*, was seized at Head Harbor, New Brunswick, because she had bought herrings intended to be used as bait for fishing. Judge Hazen, of the vice-admiralty court of St. John's, before whom the case of whether she was liable to forfeiture came, held that though she had bought bait within the British territorial waters, she had not actually proceeded to catch fish with it, and consequently that the seizure could not be sustained.[34]

Previously in June, 1870, the British authorities seized in the North Bay of Ingonish, on the shore of Cape Breton Island, the American fishing vessel, *J. H. Nickerson*. They charged her with entering to procure bait and of having obtained it. The case came before Sir William Young in the vice-admiralty court at Halifax. In his decision November 15, 1871, while he condemned the vessel to forfeiture because she had bought bait in a British port preparing to fish, Sir William Young admitted that had she merely entered to buy bait without the intention of fishing, she would have been acting within her rights.[35]

[32] On this point see Westlake, "International Law," Cambridge, 1904, Part I., pp. 184, 187.

[33] "Foreign Relations of the United States, 1870," Washington, 1870, pp. 419–420.

[34] "Award of the Fishery Commission: Documents and Proceedings of the Halifax Commission, 1877," Washington, 1878, Vol. III., p. 3381.

[35] "Award of the Fishery Commission: Documents and Proceedings of the Halifax Commission, 1877," Washington, 1878, Vol. III., p. 3395.

Commenting on this decision Wharton says:[36]

In the case here cited there ought to have been no conviction, even under the statute, unless it could have been shown that the purchase was a preparation to fish within the forbidden belt, and that this was put in process of execution. Sir W. Young's dictum on this point, therefore, cannot be sustained as a matter of municipal law. As a ruling of international law it is of no authority, since preparing to fish without fishing is in any view not a contravention of the treaty of 1818. But Sir W. Young's ruling, on the merits, coincides with that of Judge Hazen, since he concedes that merely buying fish within the three miles is not a violation of the treaty.

In order to eliminate the friction caused by such seizures of American vessels in the British fishing grounds, the American- British Joint High Commission, which met in Washington in February, 1871, to negotiate a comprehensive treaty whereby "the Alabama Claims," the chief cause of difference between the two countries, should be submitted to a satisfactory form of arbitration,[37] and all other points of difference between America and England then causing friction and dispute and liable to imbitter their peaceable relations should be satisfactorily adjusted, took up for solution with other questions that of the northeastern fisheries. In respect to that question, the Treaty of Washington of May 8, 1871, extended facilities and liberty to American fishermen to take fish in the sea fisheries, and to British fishermen like facilities and liberty to catch fish in the American Atlantic sea fisheries north of the thirty-ninth parallel of north latitude.[38] The treaty provided for reciprocal free trade for a term of years of "fish-oil" and the fish taken from the sea fisheries between America, and Canada and Newfoundland.

As a result of the Treaty of Washington of 1871, the difficulties arising from the divergence of the views of the two governments as to the rights of American citizens to catch fish in the British North American colonial waters, were mostly, during the time the treaty was in operation, smoothed over. However, in Fortune Bay, Newfoundland, on Sunday, January 6, 1878, the local inhabitants, pre-

[36] Francis Wharton, "A Digest of the International Law of the United States," Washington, 1887, Vol. III., p. 53.

[37] Thomas Balch, "International Courts of Arbitration, 1874," 3d edition, Philadelphia, 1899.

[38] "Treaties and Conventions concluded between the United States of America and other Powers since July 4, 1776," Washington, 1889, p. 486.

vented from fishing by local regulations of Newfoundland, attacked some American fishermen, who, invoking the protection of the provisions of the treaty of 1871, prepared to fish.[39] The Newfoundlanders destroyed the boats and nets of the Americans. In the official correspondence that ensued, the British government argued that the treaty granted to the Americans only the right to fish in common with British subjects, and thus the former were amenable to the local Newfoundland laws and regulations.

The American authorities contended that the local laws could not be allowed to regulate or prescribe the provisions of the treaty; in addition they maintained that damages were due the American fishermen because of the violent attack on them. Eventually this dispute was adjusted by a money payment by Great Britain to the United States of £15,000 "without prejudice to any question of the rights of either government under the treaty of Washington."[40] Except for this incident the fishing seemed to proceed smoothly until, upon the giving of due notice by the United States, the provisions of the treaty of 1871 regulating the fisheries came to an end on July 1, 1885. As a result of informal negotiations between Secretary Bayard for America, Minister West for Great Britain, and Sir Ambrose Shea for Canada, it was agreed that the privileges of inshore fishing in the respective American and British waters to which the provisions of the treaty had applied would be continued for the whole season of 1885.

In the year 1886 the Canadian authorities seized many American fishing vessels.

On May 6 of that year the Canadian steamer *Landsdowne* seized in Annapolis Basin, Nova Scotia, a landlocked harbor, where it would seem ridiculous to suppose that an American vessel would attempt to fish, the *David J. Adams* of the American fishing fleet.[41] She was then taken by the Canadian authorities to Saint Johns, New Brunswick, and on May 10 brought back to Digby, Nova Scotia,

[39] House Executive Documents, No. 84, 46th Congress, 2d Session, Washington, 1880.

[40] "Foreign Relations of the United States, 1881," Washington, 1882, p. 509.

[41] "Foreign Relations of the United States, 1886," Washington, 1887, pp. 341–346, 373–380, 396–404.

without any explanation or hearing being given to her captain. At Digby, a paper, which was alleged to be the legal precept for her capture and detention, was nailed to her mast. But this alleged writ was placed so high that it could not be read. The Canadian authorities refused the requests of both the captain of the vessel and of the American Consul General to be allowed to detach this paper in order to learn its contents Neither would the captain of the *Landsdowne* tell the American Consul General the ground upon which he had captured the American vessel. After many vigorous protests by Secretary Bayard and Minister Phelps to Lord Roseberry, the British Foreign Secretary, Sir Lionel Sackville West, the British Minister at Washington, communicated to Mr. Bayard a minute of the Canadian privy council that agreed that the condemnation proceedings against the *David J. Adams* should be stopped for the alleged violation of the fishery statutes, provided that the owners of the vessels would agree that they would not base upon this discontinuance a claim for damages or expenses. This minute of the Canadian privy council was practically an avowal that the seizure of the *David J. Adams* had been made without good or sufficient cause.[42]

On October 7, 1886, a little before midnight, the American fishing vessel, *Marion Grimes,* arrived seeking refuge from a storm at sea, at the outer harbor of Shelbourne, Nova Scotia.[43] She anchored about seven miles from the port of Shelbourne, no one leaving her until six o'clock the next morning. She then hoisted sail and stood out to sea. As soon as she had started, however, the Canadian cruiser *Terror* sent a boat's crew to arrest the *Marion Grimes.* Captain Landry of the American vessel, was then forced to proceed to Shelbourne to appear before the collector of customs there. In spite of the fact that the customs house was closed during the night, that the storm proved he had merely sought a haven of refuge from its violence, that he had stayed a very short time and that the *Marion Grimes* was equipped only for deep sea fishing, Captain Landry

[42] "Foreign Relations of the United States, 1888," Washington, 1889, Part I., p. 802.

[43] "Foreign Relations of the United States, 1886," Washington, 1887, pp. 362–370.

was fined $400. This fine was imposed chiefly by the insistence of Captain Quigley, commander of the *Terror*. Captain Landry then applied to Mr. White, the American consular agent. Owing to the importance to the success of the venture of the *Marion Grimes* that she should not be detained, Mr. White at once telegraphed the facts of the case to Mr. Phelan, the American Consul General at Halifax. Mr. Phelan took the matter up with the assistant commissioner of customs at Ottawa, who replied the fine could not be reduced, but that the $400 could be deposited at Halifax, to await a decision in the case. Mr. Phelan made the deposit at Halifax and telegraphed to Captain Landry he was at liberty to take his vessel to sea. On October 11, Captain Landry, whose vessel had by that time been held up four days, telegraphed to Consul General Phelan that "the custom-house officers and Captain Quigley" refused to let him go to sea. The next morning the consul general called on the collector of Halifax to learn if the order to release the *Marion Grimes* had been issued, and was told such an order was sent, "but that the collector and the captain of the cruiser refused to obey it, for the reason that the captain of the seized vessel hoisted the American flag while she was in custody of the Canadian officials." Mr. Phelan telegraphed this news to the assistant commissioner at Ottawa, and received a reply dated October 12 that the "collector had been instructed to release the *Grimes* from customs seizure. This department has nothing to do with other charges." The same day the collector of customs at Halifax sent a dispatch to the collector at Shelbourne to release the *Marion Grimes,* in which he said that "this department (customs) has nothing to do with the other charges. It is the department of marines."

What happened concerning the hoisting of the American flag by the captain of the *Marion Grimes* over his vessel was thus told by Secretary Bayard in a dispatch to Minister Phelps:

On October 11 the *Marion Grimes,* being then under arrest by order of local officials for not immediately reporting at the custom house, hoisted the American flag. Captain Quigley who, representing, as appeared, not the revenue, but the marine department of the Canadian administration, was, with his "cruiser" keeping guard over the vessel, ordered the flag to be hauled down. This order was obeyed; but about an hour afterwards the flag was again hoisted, whereupon Captain Quigley boarded the vessel with an armed

crew and lowered the flag himself. The vessel was finally released under orders of the customs department, being compelled to pay $8 in addition to the deposit of $400 above specified.

For this insult to the American flag, Secretary Bayard demanded an apology, and December 7, 1886, the British Minister at Washington, under instruction from the Earl of Iddesleigh, British Secretary of Foreign Affairs, communicated to the American government a communication from the government of the Dominion of Canada apologizing for the hauling down of the flag of the *Marion Grimes* by Canadian officials.[44]

Owing to this harassing of American fishermen in Canadian territorial waters, under the guise that they transgressed the Canadian customs regulations, the American Congress on March 3, 1887, approved an act whereby power was given to the president to retaliate upon the Canadians.

Negotiations, with a view to arrange an amicable settlement were continued by the American and the British governments.[45] Finally a convention was agreed upon at Washington, February 15, 1888, subject to ratification by the American Senate, the Canadian Parliament and the Newfoundland Legislature.[46]

This convention provided that the width of exclusively territorial bays, wherein American fishermen were excluded from taking fish by the Treaty of 1818, should be extended from six miles from shore to shore, according to the well-recognized and established custom of International Law, to a distance of ten miles from land to land. Thereby the extent of Canadian and Newfoundland territorial waters from which American fishing vessels were barred was increased. In addition, the convention restricted American fishermen from fishing in specifically named bays, such as the Baie des Chaleurs in New Brunswick, and Fortune Bay in Newfoundland, that varied in width from ten to twenty-one miles from shore to

[44] "Foreign Relations of the United States, 1886," Washington, 1887, pp. 491, 492.

[45] Senate Executive Documents, No. 113, 50th Congress, 1st Session, Washington, 1888, pp. 56–65, 112–119.

[46] Senate Executive Documents, No. 113, 50th Congress, 1st Session, Washington, 1888, pp. 127–142. Joseph I. Doran, "Our Fishery Rights in the North Atlantic," Philadelphia, 1888, pp. 54–67.

shore. In that way the extent of territorial waters from which American fishermen were excluded under the treaty of 1818 was still further extended. The convention guaranteed free passage to American *fishing vessels* through the Gut of Canso,[47] a right to which they were entitled by the Law of Nations. The convention also provided a right of refuge to American fishermen in Canadian ports fleeing from the danger of storms—a right to which all seafaring men are entitled in the ports of all civilized countries—and, when the American vessels needed to make repairs, the privilege to land their catch and tranship it to America.

In view of the very great advantages that were given by this convention to Canada and Newfoundland in exchange for rights which American fishing vessels already possessed under the Law of Nations without any grant by treaty from either Canada or Newfoundland, the American Senate very properly refused August 21, 1888, to confirm the convention, and so it failed to become a treaty.

During the latter part of 1890 and the beginning of 1891, Secretary Blaine for America and Sir Julian Pauncefote for Great Britain held numerous parleys concerning the fishery question as between America and Newfoundland. Their negotiations finally resulted in a convention known as the Blaine-Bond Convention, since Sir Robert Bond, the Newfoundland premier, inspired the negotiations of the British Minister.[48] This convention was to last for five years from the date it should go into operation, and might thereafter be renewed from year to year. It provided that American fishing vessels entering Newfoundland waters should have the privilege of buying bait on the same terms as Newfoundland fishing vessels. Also it was agreed that American fishing vessels should " have the privilege of touching and trading, selling fish and oil, and procuring supplies in Newfoundland, conforming to the harbor regulations, but without other charge than the payment of such light, harbor and customs dues as are or may be levied on New-

[47] Senate Executive Documents, No. 113, 50th Congress, 1st Session, Washington, 1888, p. 135. John Westlake, " International Law," Cambridge University Press, 1904, Part I., p. 193.

[48] " Convention between the United States of America and Great Britain, for the Improvement of Commercial Relations between the United States and Her Britannic Majesty's Colony of Newfoundland." This unratified agreement is known as the Blaine-Bond Convention.

foundland fishing vessels." The convention provided for a reciprocal free exchange of various American and Newfoundland products. To make the convention operative the plenipotentiaries agreed that it should be subject to ratification by the American Senate and Her Britannic Majesty, and that it should "take effect as soon as the laws required to carry it into operation shall have been passed by the Congress of the United States on the one hand, and the Imperial Parliament of Great Britain and the provincial legislature of Newfoundland on the other." Owing to a vigorous protest from the Canadian government, the British imperial government in a memorandum addressed on May 21, 1891, by the British Legation at Washington to the State Department, notified the American government that it could not agree to ratify the convention, "unless *pari passu* with the proposed Canadian negotiations."

A joint commission of two experts, one named by each government, to examine and report upon the subject was agreed upon in 1892; and the commission reported early in 1897.

The northeastern fisheries question was included in the work submitted for adjustment to the American-British Joint High Commission that met and organized for business at Quebec, August 23, 1898. Owing to the Joint High Commission being unable to come to a satisfactory agreement concerning the eastern frontier of the Alaska *lisière*, which was then in dispute between the American republic and the British empire, the Joint High Commission adjourned in March, 1899, without having arranged the fisheries or any other of the questions submitted to it.[49]

In 1895 and again in 1898 Canada unsuccessfully sought reciprocity herself. Secretary of State Hay and Ambassador Herbert took up at Washington the discussion of the fisheries as between America and Newfoundland and finally agreed on November 8, 1902, upon a new convention, known after the American Secretary of State and the Newfoundland premier who inspired the negotiations of the British Ambassador, as the Hay-Bond Convention.[50]

[49] Thomas Willing Balch, "The Alaska Frontier," Philadelphia, 1903, pp. 162, 168.

[50] Senate Executive Documents, No. 49, 57th Congress, 2d Session. "A Convention with Great Britain, signed at Washington on November 8, 1902, for the Improvement of Commercial Relations with Newfoundland."

As in the case of the Blaine-Bond Convention of 1891, the Hay-Bond Convention of 1902 provided that the American fishing vessels should fish in the Newfoundland waters subject to the local Newfoundland regulations regulating Newfoundland fishing vessels. The convention also provided for reciprocal free trade concessions, whereby Newfoundland gained vastly more than she gave.[51]

The Hay-Bond Convention remained in the Senate Committee on Foreign Relations unacted on, for three years. On June 15, 1905, the Newfoundland government enacted an act intended to hamper the American fishing vessels in their lawful occupation of taking fish under the provisions of the first article of the Treaty of 1818.[52] In the autumn of 1905, Premier Bond notified Secretary Hay of certain concessions he was willing to have inserted in the Hay-Bond Convention in the form of senate amendments. After these amendments were added by the Committee on Foreign Relations, the Senate as a whole made further changes that it was so clear would not be satisfactory to Newfoundland, that the convention as amended was never brought to a vote in the Senate and so never became a treaty.

In view of the probable serious interference by the Newfoundland authorities with the American fishing vessels in taking fish in those territorial waters of Newfoundland on the southern coast of Newfoundland from Cape Ray eastward to the Rameau Islands, and up along the western coast of the island from Cape Ray and round on the north coast to Quirpon Islands as guaranteed to them by the Treaty of 1818, Mr. Root, the American Secretary of State, wrote on October 19, 1905, to Sir Mortimer Durand, the British Ambassador at Washington, an expression of some of the views held on the fisheries question by the American government. Reasserting once again the view of the American government of the right of American fishing vessels to fish in the treaty waters unhampered by the local regulations of Newfoundland, he said:[53]

[51] Speech of Senator Henry Cabot Lodge, April 2, 1903.

[52] "Supplement to the American Journal of International Law," James Brown Scott, chief editor, January, 1907; "An Act of Newfoundland Respecting Foreign Fishing Vessels," p. 22.

[53] "Foreign Relations of the United States," 59th Congress, 1st Session, 1905. House Documents, Vol. I., Washington, 1906, p. 491.

Any American vessel is entitled to go into the waters of the treaty coast and take fish of any kind. She derives this right from the treaty (or from conditions existing prior to the treaty and recognized by it) and not from any permission or authority proceeding from the government of Newfoundland.

Secretary Root also called Sir Mortimer Durand's attention to the evident hostile animus of the colony of Newfoundland towards American fishing vessels as shown by the "Foreign Fishing Act" enacted the previous June by the Newfoundland government.[54] The provisions in that act that gave authority to Newfoundland officials to search any foreign fishing vessel in any of the territorial waters of Newfoundland and upon finding any bait or fishing apparel to arrest and bring the vessel into port, Secretary Root pointed out were a clear and palpable infringement of American rights under the Treaty of 1818 in the treaty waters. Secretary Root also referred Sir Mortimer Durand's attention, as a result of the Newfoundland legislation that prohibited the sale of bait by the Newfoundlanders to American fishing vessels, to the unrest and profound dissatisfaction existing among the local population living along the shores of or near the "Bay of Islands" on the west coast of Newfoundland with the resulting situation and the risk of serious violence resulting therefrom.

To these observations of the American Secretary, the British Ambassador in reply enclosed in a note of February 2, 1906, to Mr. Reid, the American Ambassador at London, a memorandum of Sir Edward Grey, the British Foreign Secretary.[55] In this memorandum the British government replied that the privileges of fishing "conceded" by the Treaty of 1818 in some of the territorial waters of Newfoundland were "conceded, not to American vessels, but to inhabitants of the United States and to American fishermen." The British memorandum reasserted the old view enunciated by Earl Bathurst, that by the Treaty of 1818 "a new grant to inhabitants of the United States of fishing privileges within the British Jurisdiction" was made. In the memorandum it was further maintained that "American fishermen" could not claim to exercise the right of

[54] "Supplement to the American Journal of International Law," January, 1907, p. 22.

[55] "Supplement to the American Journal of International Law," October, 1907, p. 355.

fishing within the territorial waters of Newfoundland "on a footing of greater freedom than the British subjects 'in common with' whom they exercised it under the convention. In other words, the American fishery under the convention is not a free but a regulated fishery, and, in the opinion of His Majesty's government, American fishermen are bound to comply with all colonial laws and regulations, including any touching the conduct of the fishery, so long as these are not in their nature unreasonable, and are applicable to all fishermen alike." The British note went on to argue that all American and other foreign vessels sojourning within British territorial waters should obey the local law, "and that, if it is considered that the local jurisdiction is being exercised in a manner not consistent with the enjoyment of any treaty rights, the proper course to pursue is not to ignore the law, but to obey it, and to refer the question of any alleged infringement of their treaty rights, to be settled diplomatically between their government and that of His Majesty." In reply to Secretary Root's contention that the Newfoundland foreign fishing-vessel act of June 15, 1905, was directed against American fishing vessels so as to interfere with their rights in the treaty waters the British memorandum maintained that that act, especially the first and third sections, upon which Secretary Root had largely based his complaint, was not aimed at the rights of American vessels in particular. The memorandum referred to the seventh section of the act, as safeguarding "the rights and privileges granted by treaty to the subjects of any state in amity with His Majesty." And then the British note went on to admit that "the possession by inhabitants of the United States of any fish and gear which they may lawfully take or use in the exercise of their rights under the convention of 1818 cannot properly be made *prima facie* evidence of the commission of an offense, and, bearing in mind the provisions of section 7, they can not believe that a court of law would take a different view."

Nevertheless, this was an admission by the British Foreign Office that the act was so framed that the Newfoundland officials could, through legal processes, so harass and "hold up" an American fishing vessel that her trip would be rendered unprofitable, as happened in many cases during the latter eighties in the ports and terri-

torial waters of Nova Scotia, for example in the case of the *Marion Grimes.*

As a result of the views expressed by Secretary Root in his letter of October 19, 1905, the Newfoundland government repealed the act to which he objected and enacted on May 10, 1906, a second act relating to fishing in her territorial waters by foreigners.[56] The new act was drawn so as to avoid for American fishing vessels the two special provisions against which Secretary Root had complained, but at the same time new provisions that were added gave the power to obstruct and harass American vessels in their fishing ventures should it become advisable.

To the views of the British government as expressed in its memorandum of February 2, 1906, Secretary Root replied in an elaborate and able letter on June 30, 1906, addressed to the American Ambassador at London, Mr. Reid, by whom it was communicated to Sir Edward Grey.[57] Secretary Root protested in this letter against the possible inferences suggested in the memorandum that the Newfoundland government has the right to require of any American captain entering the treaty waters or any port of the colony to furnish evidence that all the members of his crew are inhabitants of the United States. and the Secretary of State denied the assertion that the colony of Newfoundland has the right irrespective of any agreement on the subject, between the parties to the Treaty of 1818, America and Great Britain, to interfere through local legislation with the American fishing vessels in the exercise of their fishery rights under the Treaty of 1818.

In previous correspondence regarding the construction of the Treaty of 1818, the government of Great Britain has asserted, and the memorandum under consideration perhaps implies, a claim of right to regulate the action of American fishermen in the treaty waters, upon the ground that those waters are within the territorial jurisdiction of the colony of Newfoundland. This government is constrained to repeat emphatically its dissent from any such view. The Treaty of 1818 either declared or granted a perpetual right to the inhabitants of the United States which is beyond the sovereign power of England to destroy or change. It is conceded that this right is, and forever

[56] "Supplement to the American Journal of International Law," January, 1907, p. 24.

[57] "Supplement to the American Journal of International Law," October, 1907, p. 364.

must be, superior to any inconsistent exercise of sovereignty within that territory. The existence of this right is a qualification of British sovereignty within that territory. . . .

For the claim now asserted that the colony of Newfoundland is entitled at will to regulate the exercise of the American treaty right is equivalent to a claim of power to completely destroy that right.

As a result of this vigorous exchange of views between the America and the British government, a *modus vivendi,* with the object of avoiding any clash between the American fishermen and the Newfoundland authorities or inhabitants during the fishing season of 1906–07, was concluded early in October, 1906, at London, between the two governments that were parties to the Treaty of 1818.[58] The British government agreed to the use of purse seines, and the shipment of Newfoundlanders by American vessels outside the three-mile limit. On the other hand the American government waived the right of American vessels to take fish on Sunday, and agreed that they would pay lighthouse dues, and where possible comply with the local customs regulations. The provisions of the Foreign Fishing Vessels Act of 1906 of Newfoundland, and the objectionable first and third sections of the Act of 1905 were not to apply to American vessels. With this agreement in force, the fishery of 1906–'07 was happily accomplished without untoward incident. At the beginning of September, 1907, a new *modus vivendi* to apply to the next fishery season was agreed to by the two interested nations.[59] This new *modus vivendi* was practically the same in its provisions as that of the previous season, except that the American government made a further concession of waiving the use of purse seines. In July, 1908, the modus vivendi of the previous year was renewed for the fishery of 1908–'09.[60]

In order to finally settle this vexatious dispute between the American republic and the British empire over the Atlantic fisheries question, in January, 1909, the two Powers at a conference held in Washington agreed to refer the matter to the decision of The Hague

[58] "Supplement to the American Journal of International Law," January, 1907, pp. 27–31.

[59] "Supplement of the American Journal of International Law," October, 1907, pp. 375–377.

[60] "Supplement of the American Journal of International Law," October, 1908, pp. 327–328.

International Court. At this conference, America was represented by Secretary of State Root, and the British empire, by Ambassador Bryce, who was aided by Mr. Aylesworth and Mr. Kent respectively for the Dominion of Canada and the Colony of Newfoundland.

In deciding upon the American-British Atlantic fisheries dispute The International Court at The Hague will be called upon, according to the terms of the Root-Bryce Treaty of January, 1909, to give its decision upon first the right of American fishing vessels under Article I. of the Treaty of 1818 to take fish in the bays and gulfs, more than six miles wide; whether the rights retained to inhabitants of the United States by the Treaty of 1818 concluded between America and Great Britain, two sovereign States members of the family of nations, can be regulated at will by the legislation of either Great Britain herself or one of her colonies or whether all changes or regulations applicable to the treaty can *only* be made by a mutual agreement between the original high contracting parties, the American republic and the British empire; and also, whether the inhabitant of the United States have the liberty under Article I. of the Treaty of 1818 to take fish in the territorial waters along that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, or along the western and northern coast of Newfoundland from Cape Ray to Quirpon Islands or in the territorial waters of Canada around the Magdalen Islands?

By an agreement, expressed in two letters exchanged on January 27, 1909, between Secretary Root and Ambassador Bryce, the right of American vessels to pass through the Gut of Canso and to take fish in the Bay of Fundy are not to be submitted for decision to the International Court at The Hague.

While the right of "innocent passage" by American vessels through the Gut of Canso will not be submitted to The Hague Court, yet the raising of that point by Canada in the past is too illuminative of the whole fishery question to pass it over without notice.

About 1839 the point was raised by the authorities of Nova Scotia that the Gut of Canso,[61] a passage of salt water connecting the Atlantic Ocean and the Gulf of Saint Lawrence that passed

[61] Senate Executive Documents, No. 100, 32d Congress, 1st Session, Washington, 1852, pp. 73–74.

between the Province of Nova Scotia and the neighboring island of Cape Breton, a part of the colony of Nova Scotia, was not a free passage to American vessels, because the Gut of Canso, which at some points was only a mile wide, belonged as territorial waters to Nova Scotia. Though this attempt to lay a claim to close the Gut of Canso as a free highway of the sea to American vessels was not seriously pushed at the time, the effort to claim the right to close it to American vessels was renewed in the Bayard-Chamberlain Convention of 1888.[62] In that instrument Canada proposed to guarantee to American fishing vessels the free passage through the Gut of Canso. But Canada was thereby undertaking to concede to America what already belonged to America as a right by the Law of Nations. Not only in 1888 but long before that it was a well-established principle of International Law that passages of the sea connecting two large bodies of water, were open to navigation by vessels of all powers.

Westlake, who for twenty years held the chair of International Law in Cambridge University, and for six years was one of the English members of The Hague International Court and to-day is in the forefront of international jurists, in speaking of the right of passage through straits, says:[63]

> If the strait connects two tracts of open sea, as the Gut of Canso between Cape Breton Island and the mainland of Nova Scotia, or the Straits of Magellan and the other passages in the extreme south of America, the lawful ulterior destination is clear, and there is a right of transit both for ships of war and for mechantmen.

Many other authorities can be cited to the same purpose, but in view of this clear statement by Westlake, who, together with Holland of Oxford, is one of Great Britain's leading living authorities on questions of International Law, it does not seem worth while.

The attempt at various times to include within the jurisdiction of Canada and Newfoundland bays and gulfs more than six miles in width, such as the Bay of Fundy and the Baie des Chaleurs, for instance, is an attempted restriction on the freedom of the high seas.

[62] Senate Executive Documents, No. 113, 50th Congress, 1st Session, Washington, 1888, p. 135.

[63] John Westlake, "International Law," Part I., "Peace"; Cambridge, 1904, p. 193.

Ever since the famous argument between Grotius and Selden as to whether the high seas should be free to the vessels of all the world or whether parts, greater or smaller as the case might happen to be, of the high seas should be subject to the jurisdiction of one nation, the verdict of the world has leaned more and more towards the view of the famous Hollander.[64] Practically all international jurists are agreed now that the high seas are free and that the territorial waters of a nation only extend to three miles from land and over those bays or portions of them that are not more than six miles across from shore to shore.

The learned Belgian jurist, Mr. Justice Nys, a member of the Court of Appeals of Brussels and of The Hague International Court, thus sums up the question of the freedom of the high seas. He says:[65]

> La haute mer, la pleine mer, la mer pour employer la désignation usuelle, est libre. Elle n'est pas susceptible de possession et de propriéte à cause de sa nature physique, de la mobilité et de la fluidité de ses flots, de l'étendue sur laquelle devrait s'appliquer la sanction des ordres ou des prohibitions; elle ne peut tomber sous le droit de police, de suprématie, d'empire d'un ou de plusieurs États à cause de l'egalité juridique des membres de la société internationale.

Oppenheim who now sits as successor to Westlake, by whom he was chosen, in the chair of International Law at Cambridge University, holds that many enclosed seas that are connected with the ocean by passages less than six miles in width are as free to navigation

[64] Le Comte de Garden, "Traité Complet de Diplomatie," Paris, 1833, Vol. I., pp. 402–404. A. G. Heffter, "Le Droit International de l'Europe; Quatrième édition Française, augmentée et annotée par F. Heinrich Geffcken," Berlin and Paris, 1883. F. de Martens, "Traité de Droit International," traduit du Russe par Alfred Léo, Paris, 1883, Vol. I., pp. 491–494. Alphonse Rivier, "Principes du Droit des Gens," Paris, 1896, Vol. I., pp. 236–237. Hannis Taylor, "A Treatise on International Public Law," Chicago, 1901, pp. 290–294. John Westlake, "International Law," Cambridge, 1904, Part I., pp. 160–163. Ernest Nys, "Les Origines du Droit International," Paris and Brussels, 1894, pp. 379–387; "Le Droit International, Les Principes, les Théories, les Faits," Paris and Brussels, 1905, Vol. II., pp. 135–138. L. Oppenheim, "International Law," London, 1905, Vol. I., pp. 300–306. George B. Davis, "Elements of International Law," New York, 1908, p. 57 *et seq.*

[65] Ernest Nys, "Le Droit International, Les Principes, les Théories, les Faits," Paris and Brussels, 1905, Vol. II., p. 134.

for the vessels of all nations as any part of the ocean. He says:[66]

The enclosure of a sea by the land of one and the same state does not matter, provided such a navigable connection of salt water as is open to vessels of all nations exists between such sea and the general body of salt water, even if that navigable connection itself be part of the territory of one or more riparian states. Wheras, therefore, the Dead Sea is Turkish and the Aral Sea is Russian territory, the Sea of Marmora belongs to the open sea, although it is surrounded by Turkish land and although the Bosphorus and the Dardanelles are Turkish territorial straits, because these are now open to merchantmen of all nations.

So, too, Hudson's Bay is a part of the high seas, for the entrance to that large interior sea to the vessels of all nations is through Hudson Strait that is much more than six miles wide.

It is only within territorial waters that a state can by its legislation restrict vessels of other nations from doing all those things that the vessels of all nations can properly do upon the high seas. What are the territorial waters of each state?

Phillimore, judge of the British High Court of Admiralty, says:[67]

The limit of territorial waters has been fixed at a marine league, because that was supposed to be the utmost distance to which a cannon-shot from the shore could reach. The great improvement recently effected in artillery seems to make it desirable that this distance should be increased, but it must be so by the general consent of nations, or by specific treaty with particular states.

The three-mile limit as the extent of the territorial waters of nations along their sea front, except where a modification has been made by treaty between the contracting parties, is to-day universally recognized.

With the aim of bringing about a universal change in the extent of the territorial belt of waters along the sea front of nations, the Institute of International Law in March, 1894, after careful consideration and weighing the arguments *pro* and *con,* gave it as its opinion that the belt of territorial waters along the coast line of each nation should be extended from three to six miles from low water.[68]

[66] L. Oppenheim, "International Law," London, 1905, Vol. I., p. 307.

[67] Sir Robert Phillimore, "Commentaries upon International Law," second edition, London, 1871, Vol. I., p. 237. Phillimore was a member of Her Majesty's Privy Council and judge of the High Court of Admiralty. The first edition of this volume appeared in 1854.

[68] Charles Calvo, "Le Droit International," Paris, 1896, cinquième edition, Vol. VI., p. 67.

And that in the case of bays the line from headland to headland that should show where the open sea ended should be twelve miles across, except in those cases where immemorial usage had consecrated a greater distance. In view of the modern development of arms and the more rapid means of communication and the vast expansion of commerce, this would seem to be a most admirable change in the universally existing recognition of the extent of territorial waters. But the Institute of International Law is a body of gentlemen learned in the Law of Nations and not a congress of representatives from all the nations of the earth with plenary powers to change the Law of Nations for the best interests of mankind. Consequently, however advisable the recommendation of the institute may be, it cannot change the extent of territorial waters unless the nations of the world agree. And America has not joined in any such agreement. But even if the American government had joined the governments of other nations to double the extent of the territorial belt of water, yet such an agreement would not alter the extent of the rights of American fishermen to catch fish in the Bay of Fundy, the Baie des Chaleurs and other smaller bodies of water as defined in the first Article of the Treaty of 1818. The limit of the area over which American fishing vessels can take fish along the coasts of the maritime provinces of the Dominion of Canada and Newfoundland, is limited only by the recognized three mile limit, except that in the treaty waters American vessels have rights to catch fish that the vessels of other nations do not possess.

In addition to attempting to offer to America the right for American fishing vessels to navigate the Gut of Canso and also to curtail the area over which they possess the right to catch fish in the high seas close to the shores of Canada and Newfoundland, both Canada and Newfoundland have sought by various local legislation to so hamper American fishing vessels in their just rights to take fish as to make their occupation unprofitable.

The aim of all these various attempts of Canada and Newfoundland to nullify the privileges of American fishing vessels as defined by article one of the Treaty of 1818 has been to force America to grant to Canada and Newfoundland favorable trade reciprocity. But the contracting parties to the Treaty of 1818 were neither Can-

ada nor Newfoundland. The contracting parties to that treaty were the American republic and the British empire. Of what use would it be for these two sovereign members of the family of nations to agree solemnly by treaty to define the respective rights of their subjects in the Atlantic fisheries, if power was reserved to either party by local legislation to completely nullify the plain and evident intent of the treaty which recognizes that American fishing vessels possessed in those waters certain rights and privileges to catch fish that the fishing vessels of all other nations do not possess under the ordinary Law of Nations. As Vattel justly says, treaties are sacred contracts between nations.[69]

The Brazilian jurist Calvo, after quoting in full the text of article one of the Treaty of 1818, says of the purpose of this article:[70]

> Rien dans cet article ne permet d'inférer que la Grande-Bretagne ait conféré aux États-Unis le droit de pêche. Ceux-ci n'ont fait que renoncer à certains privileges, ce qui implique, de la part de l'Angleterre, que ces privilèges existaient et que les États-Unis ont uniquement cédé une fraction de leur droit souverain. La Grande-Bretagne n'a pas dit aux États-Unis: "Venez seulement pour chercher un abri ou faire de l'eau ou du bois," mais les États-Unis disent à la Grande-Bretagne: "Nous, les proprietaires en commun de ces pêcheries consentons à ne pas prendre de poissons et à ne pas les secher ou les saler dans certaines limites, et à ne pas abuser d'ailleurs de privileges qui nous sont concédés."

And he goes on to say:[71]

> Jamais loi municipale ne saurait prévaloir sur une convention internationale.

The uselessness for members of the family of nations to make certain agreements by formal treaty, if those agreements could be nullified by the local legislation of a colony or province or state of a party to the treaty contract seems self-evident. In the constitution of the United States provision is made to insure the maintenance of

[69] Vattel, "Le Droit des gens," Paris and Lyons, 1820, Vol. II., p. 25.

[70] Charles Calvo, "Le Droit International Théorique et Pratique," cinquième édition. Vol. I., Paris, 1896, pp. 486–487.

[71] Charles Calvo, "Le Droit International Théorique et Pratique," cinquième édition, Paris, 1896, Vol. I., pp. 487–488.

international treaties entered into by the American federal government. Article sixth of the American Constitution says:[72]

All treaties made or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

The chief powers of Europe at the London conference in 1871, on January 5, adopted, as the Russian jurist de Martens tells us, this principle:[73]

The plenipotentiaries of the North German Confederation, Austria-Hungary, Great Britain, Italy, Russia and Turkey, to-day assembled *en conférence*, recognize that it is an essential principle of the Law of Nations that no power can liberate itself from the engagements of a treaty, nor modify its stipulations except with the consent of the contracting parties obtained by means of an amicable arrangement.

Thus Great Britain has affirmed the sanctity of treaties in a formal manner. Very properly America maintains that any modification of the rights of American fishing vessels under the Treaty of 1818, whether by amendment to that treaty or by police or maritime or customs or other regulation, can only be accomplished by agreement between the two parties to the contract known as the Treaty of 1818, the governments of the United States of America and of the British empire. Were an opposite doctrine recognized by the Hague International Court, what would become of the validity of many international treaties in force to-day between the nations of the earth. At the bar of the Hague International Court the United States of America will appear to defend the maintenance and sanctity of international contracts known under the generic name of treaties.

[72] For the argument of the strict constructionists see William E. Mikell, "The Extent of the Treaty Making Power of the President and the Senate of the United States," *University of Pennsylvania Law Review and American Law Register*, 1909, pp. 435–458, 528–562.

For the argument of the loose constructionists see Chandler P. Anderson, "The Extent and Limitations of the Treaty Making Power under the Constitution," *The American Journal of International Law*, July, 1907, pp. 636–670. See also the exhaustive treatise of Charles Henry Butler, "The Treaty-making Power of the United States," New York, 1902.

[73] F. de Martens, "Traité de Droit International," traduit du Russe par Alfred Léo, Paris, 1883, Vol. I., p. 546.

All through the negotiations relating to the fisheries question since the treaty of partition of 1783, the British empire and her two colonies of Canada and Newfoundland have sought to cut down the rights assigned by the partition treaty of 1783 to American citizens to catch fish in the territorial waters adjoining the Gulf of Saint Lawrence and the adjoining regions. Some of those rights America *consented* in the formal Treaty of 1818, concluded with the British imperial government, to give up. But not satisfied with the substantial gains then obtained, both Canada and Newfoundland through one subterfuge or another, have again and again tried to obtain more concessions from America by offering a shadow, as guaranteeing the right, for example, for American fishing vessels to navigate the Gut of Canso, for a reality. As in the case of the Alaska frontier where Canada's land claims grew greater with the passing of the years, so in this fisheries dispute the position of America on the one hand, and of Great Britain, Canada and Newfoundland on the other hand, is well summed up in the words with which Count Nesselrode, nearly ninety years since, contrasted the positions of the Muscovite and the British empires when they were discussing their Russo-British American frontier:

> Ainsi nous voulons conserver, et les compagnies angloises veulent acquerir.